



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Triad Research, Inc.

File: B-225793

Date: July 6, 1987

DIGEST

1. There is no basis to object to the award of a contract to a corporation which at the time of submission of proposals and award had been automatically terminated because of the apparently inadvertent failure to pay an annual registration fee but took steps to become reinstated immediately when the situation was brought to its attention by a protesting competitor after award, because the same firm which submitted the proposal will perform the contract and it does not appear that the firm would have been permitted to avoid the government's acceptance of its offer.
2. Protest that awardee had intentionally misrepresented in its proposal its corporate status, labor rates and personnel classification is denied where the protester has not affirmatively proven its case and the evidence of record does not support a finding of intentional misrepresentation.

DECISION

Triad Research, Inc. protests the award of a cost-plus-fixed-fee contract to Decision Analysis Corporation (DAC) of Virginia^{1/} under request for proposals (RFP) No. DE-RP01-86EI19801, issued by the Department of Energy (DOE). The RFP solicited modeling and forecasting support services for the Energy Information Administration. Triad contends that DOE improperly evaluated proposals and asks that we investigate the conduct of the agency during this procurement.

^{1/} At the time of award on January 8, 1987, the firm was known as Decision Analysis Corporation; however, the contract was amended on February 19 to identify the awardee by its new name, Decision Analysis Corporation of Virginia.

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We dismiss the protest in part and deny it in part.

The solicitation, issued as a 100-percent small business set-aside on March 7, 1986, provided that award would be made to the responsible offeror whose offer conforms to the solicitation and is most advantageous to the government, cost and other factors considered. Offerors were required to submit separate technical, cost and contract proposals, and were advised that the technical proposal was of greater importance than the cost proposal. The evaluation factors for award, in descending order of importance, were as follows:

1. Personnel Qualifications and Ability
2. Technical Approach and Understanding of Requirements
3. Related Corporate Experience
4. Management Capabilities and Approach

Cost was to be evaluated on the basis of probable cost and fee to the government.

Proposals were received by the April 7 closing date from eight firms. An initial evaluation of the proposals was conducted and Triad was determined to be one of three firms in the competitive range. Clarification questions were posed to all three firms and each was advised of the deficiencies in its proposal and given an opportunity to submit a revised proposal. After revised proposals were evaluated, only Triad and DAC of Virginia remained in the competitive range. The revised cost proposals were audited by DOE's Office of Inspector General and a cost analysis was performed by the DOE Cost and Price Branch in preparation for the agency's negotiation position.

Negotiations were conducted with both firms and best and final offers (BAFOs) were requested and received by December 5. Both firms improved their technical scores. DAC of Virginia's score was 22 points higher than Triad's and its proposed costs were significantly lower. In making the award determination, the contracting officer utilized the evaluation of BAFOs, the cost analysis and the recommendations from the Technical Evaluation Committee (TEC) regarding the technical capabilities of Triad and DAC of Virginia. Because DAC of Virginia received the highest technical score and had the lowest estimated cost of the two firms, DOE awarded a contract to the firm on January 8, 1987. Thereafter, Triad filed its protest with this Office.

Triad states that the reason for protesting which is "most important" to it is that DOE has not been timely or cooperative in providing it with copies of documents. Consequently, Triad alleges that it has been unable to substantiate some of the bases of its protest. In addition, the protester asserts that its copy of the agency report was so expurgated by DOE that it was unable to file detailed comments on the report.

To the extent that Triad's complaint relates to DOE's duty to furnish documents in connection with its protest pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(f) (Supp. III 1985), the contracting agency has the initial responsibility for determining which documents are subject to release. Cottage Grove Land Surveying, B-223207, Sept. 12, 1986, 86-2 C.P.D. ¶ 291. To the extent Triad is requesting the release of documents pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982), only the contracting agency and the courts have the authority to decide what information the agency must disclose under the FOIA. We point out, however, that although the documents in question were withheld from the protester, DOE has filed a complete report with our Office which includes all documentation that support the technical evaluations; for example, the evaluators' report, the audit findings and the cost analysis. We have reviewed these documents in camera as well as the protester's and awardee's proposals in reaching our decision. See Raytheon Ocean Systems Co., B-218620.2, Feb. 6, 1986, 86-1 C.P.D. ¶ 134.

Triad challenges the award on essentially three bases: first, that the awardee falsely certified its corporate status and should have been disqualified from award because it "did not legally exist" at that time; second, that DAC of Virginia intentionally misrepresented its labor rates and the positions held by certain proposed key employees; and, finally, that DOE and its auditors applied different evaluation criteria and requested different levels of supporting documentation from the two firms.

Triad's first contention is premised on information obtained through another competitor that DAC of Virginia's corporate charter had been terminated by the State of Virginia in September 1985 for nonpayment of registration fees. The protester alleges that DAC of Virginia's president knew or should have known that the Virginia State Corporation Commission requires a corporation to maintain its corporate status by paying, when due, its registration fee. In light of this, Triad asserts that the awardee knowingly misrepresented its corporate status when it submitted a proposal under this RFP. The protester also asserts that

DAC of Virginia should have been disqualified from award because at that time it "did not legally exist."

DOE reports that the contracting officer was not aware of any defects in the awardee's corporate charter up through the time of award and that when she first learned of these allegations, on January 27, 1987, the contracting officer asked DAC of Virginia to provide information on this matter. In response thereto, the firm's president explained that he never received a bill for the firm's annual registration fee because the State apparently sent the bills to its old business address. The company provided documentation to show that it had filed a change of address form with the Commission but that the information was never processed because the form was not accompanied by the payment of a \$5.00 processing fee. The firm was not aware that its data had not been processed because it received at least one piece of correspondence from the Commission sent to its new address after the change of address form had been filed. DAC of Virginia furnished further evidence that its corporate charter was reinstated on February 6, but under a new name, because the firm's original corporate name had been reserved 2 weeks earlier by one of the competitors in this procurement. The contracting officer states that upon reviewing the evidence provided by DAC of Virginia, she determined that the firm's president was not aware prior to contract award that its corporate charter had been terminated. She therefore concluded that there was no intentional misrepresentation of the firm's corporate status in its proposals. Consequently, on February 19, DOE and DAC of Virginia executed a change of name agreement and the contract was modified to identify the firm by its new name.

In its comments on the agency report, Triad criticizes the agency's handling of this matter, alleging that DOE improperly executed a change of name agreement and contract modification with DAC of Virginia.

Based on our review of the written evidence presented by DAC of Virginia, we do not find that DOE unreasonably concluded that there was no intentional misrepresentation by the firm's president in its proposals.

In addition, DOE has cited statutory and judicial authority for the proposition that upon reinstatement of an automatically terminated Virginia corporation its corporate existence is deemed to have continued from the date of termination of its corporate existence and that the corporation is liable for any liabilities incurred during the period of termination. The agency also points out that we did not object to the award of a contract to a corporation whose certificate of incorporation was not issued by the

Virginia State Corporation Commission until several weeks after bid opening where: (1) the same business who submitted the bid would also perform the contract; (2) the person who signed the bid did not indicate any intent to avoid the government's acceptance of the firm's bid; (3) the person who signed the bid did so not in his individual capacity but as president of the corporation; and (4) therefore, under Virginia law, the bidder would not be permitted to avoid the acceptance of its bid by alleging that it was not a corporation at bid opening. Telex Communications, Inc., et al., B-212385 et al., Jan. 30, 1984, 84-1 C.P.D. ¶ 127 at 6, reconsideration denied in part and decision affirmed in part, Apr. 18, 1984, 84-1 C.P.D. ¶ 440, reversed on other grounds, June 18, 1984, 84-1 C.P.D. ¶ 632. Parallel circumstances exist here. Therefore, we have no basis to overturn the award.

Triad's second principal basis for protest challenges the agency's evaluation of the awardee's proposed labor rates and key employees. The protester alleges that the firm misrepresented the labor rates and positions of proposed consultants and conditional employees within DAC of Virginia resulting in "substantially lower costs than a fair market assessment would yield." In support of this allegation, Triad relies in large part on information it obtained--subsequent to the contract award--from a proposed consultant of DAC of Virginia. The protester states that this individual "suspects that he was listed at \$75/hour and as a DAC partner" in the proposals submitted by DAC of Virginia.

We find nothing in the record to support Triad's allegations. The agency reports that in response to its request for clarifications, DAC of Virginia stated that it was negotiating a possible partnership with this individual who was, as DOE points out, previously identified in DAC of Virginia's technical proposals as a consultant. Furthermore, DOE notes that as required by the solicitation, a signed consulting agreement between the firm and this individual--effective July 16, 1986--was provided by DAC of Virginia with its initial proposal. We have examined all of the proposals submitted by DAC of Virginia in light of this protest issue and conclude that the representations made by the awardee as to this individual's role and salary was consistent with the terms of the consulting agreement.

The protester also states that it "suspects" DAC of Virginia's president misrepresented the "current market value" of other senior staff and allegedly made statements that the firm would hire "all key TRIAD and Brookhaven National Laboratory (BNL) personnel." In response, DOE states that it verified DAC of Virginia's direct labor rates and those of its subcontractors in a preaward audit and cost

analysis performed by DOE's Inspector General's audit section and its Cost and Price Branch, respectively. Based on the findings in these two reports, the contracting officer concluded that the labor rates were reasonable.

We have no basis to question DOE's judgment. Nowhere in DAC of Virginia's proposals can we find any statement that the firm intended to recruit any personnel from Triad. There are statements, however, that DAC of Virginia would consider recruiting personnel from BNL.

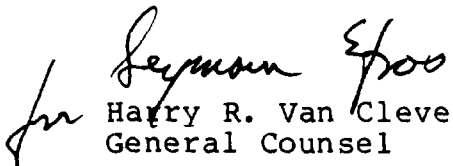
Triad's final basis for protest is a contention that DOE and its auditors were inconsistent in applying the evaluation criteria to both firms. The protester alleges that the agency's auditors did not require the same levels of support documentation from DAC as to its conditional employees and consultants. We disagree.

The record shows that letters of commitment or "willingness to work" were not required by the RFP. However, the contracting agency reports that Triad, in its response to a clarification question pertaining to hiring strategy, conditioned the availability of three key personnel upon certain events other than contract award. Consequently, during oral negotiations with Triad, the contracting officer requested that the firm remove these conditions and confirm that these three key personnel were "unconditionally available to work on the contract." DAC of Virginia was not asked to furnish any commitments since the firm did not offer any "conditional" employees in its proposals.

Finally, our review of the audit documents and request for documentation made to both firms support a finding that both were required to furnish evidence of commitment for all proposed new hires. Since there was no disparate treatment between the two firms we find the agency's actions entirely proper.

Triad seeks to recover all costs associated with filing and pursuing this protest as well as proposal preparation costs. Since we have denied the protest, these costs are not recoverable. See 4 C.F.R. § 21.6(d) (1986).

The protest is dismissed in part and denied in part.


Harry R. Van Cleve
General Counsel